Lembaga Kemajuan Tanah Persekutuan v Muda bin Jusoh

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-29-90
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
28 FEBRUARY 1991

Labour Law — Workmen's compensation — Claim for compensation for injury sustained in employment — Injured person employed by contractor engaged by appellant — Liability of appellant as principal — Public Authorities Protection Act 1948, s 2(a) — Workmen's Compensation Act 1952, ss 12(1) & 19(1)

Civil Procedure — Limitation — Claim for compensation for injury sustained in employment — Injured person employed by contractor engaged by appellant — Liability of appellant — Whether claim statute-barred — Workmen's Compensation Act 1952, s 12(1) — Public Authorities Protection Act 1948, s 2(a)

In this case the appellant in the course of carrying out its objectives had engaged a contractor to fell and clear the jungle in an area and to prepare the land for rubber planting. The respondent was employed by the contractor as a chain-saw operator to fell trees and on 26 July 1979 the respondent met with an accident while so employed. The respondent instituted action for compensation on 25 May 1983, that is, about three years and ten months after the accident. The Commissioner of Labour gave an award for compensation to be paid by the appellant to the respondent and this was confirmed by the arbitrator in the sessions court. The appellant appealed to the High Court and was allowed by the learned judge to make an amendment to the petition of appeal to plead limitation. The learned judge dismissed the appeal [see [1990] 3 MLJ 114] and the appellants appealed to the Supreme Court.

Held, allowing the appeal:

(1) The work that was being carried out by the respondent, even though the respondent was employed by a contractor, was in the course and for the purpose of the appellant's business. Section 19(1) of the Workmen's Compensation Act 1952 is intended to extend to a case of a person who, for the purpose of his trade or business, undertakes work on his account and employs a contractor to do the whole or part of the work.

(2) The action in this case is time-barred under s 12(1) of the Workmen's Compensation Act 1952 and also s 2(a) of the Public Authorities Protection Act 1948. Having allowed the amendment to be made in the petition of appeal, the learned judge should have considered the point on its merits and if he found that the claim was statute-barred, the appeal should have been allowed.

(3) The law of limitation raises the question of jurisdiction and jurisdiction cannot be conferred by acquiescence or waiver.

(4) It is up to the claimant to satisfy the court that the delay in making the claim was due to mistake, or absence from Malaysia or other reasonable cause. The onus was never discharged by the respondent.

[Bahasa Malaysia summary

Di dalam kes ini perayu di dalam menjalankan tugasnya telah menggunakan kontraktor untuk menebang dan membersihkan hutan di dalam suatu kawasan dan menyiapkan tanah itu untuk menanam getah. Responden telah diambil oleh kontraktor itu sebagai pekerja untuk mergendalikan gergaji rantai untuk menebang pokok dan pada 26 Julai 1979 responden telah ditimpa kemalangan semasa menjalankan kerjanya. Responden telah membuat permohonan untuk mendapat pampasan pada 25 Mei 1983, iaitu hampir tiga tahun dan sepuluh bulan selepas kemalangan itu. Persuruhjaya Buruh telah membuat award pampasan untuk dibayar oleh perayu kepada responden dan ini telah disahkan oleh penimbangtara di mahkamah sesyen. Perayu telah merayu ke Mahkamah Tinggi dan telah dibenarkan membuat pindaan kepada petisyen rayuannya untuk mendalih batasan had masa. Hakim yang arif telah menolak rayuan itu. [Sila lihat [1990] 3 MLJ 114.] Perayu telah terus merayu ke Mahkamah Agung.

Diputuskan, membenarkan rayuan itu:

(1) Kerja yang dibuat oleh responden, walaupun responden digajikan oleh kontraktor, adalah dalam menjalankan dan untuk perniagaan pihak perayu. Peruntukan s 19(1) Akta Pampasan Pekerja 1952, adalah bertujuan dipakai di dalam perkara di mana seorang untuk maksud tred atau urusannya mengusahakan sesuatu pekerjaan dan menggunakan seorang kontraktor untuk membuat semua atau sebahagian pekerjaan itu.

(2) Tindakan di dalam kes ini adalah terhalang oleh had masa di bawah s 12(1) Akta Pampasan Pekerja 1952 dan juga s 29(a) Akta Perlindungan Pihak Berkuasa Awam 1948. Selepas membenarkan pindaan kepada petisyen rayuan, hakim yang arif seharusnya menimbangkan perkara yang ditimbulkan itu dengan teliti dan jika ia berpendapat tindakan itu dihalang olen had masa, rayuan itu hendaklah dibenarkan.

(3) Undang-undang mengenai had masa menimbulkan soal bidangkuasa dan bidangkuasa tidak boleh diberi oleh akuiesens atau penepian.

(4) Adalah terletak kepada pemohon untuk memuaskan mahkamah bahawa kelambatan membuat tindakan itu ialah oleh kerana kesilapan atau tidak berada di Malaysia atau lain-lain sebab yang munasabah. Beban itu tidak dilepaskan oleh responden.]

Cases referred to

1 *Hockley* v *West London Timber and Joinery Co* [1914] 3 KB 1013 (folld)
2 *Soon Peng Siong* v *Sin Yuh Miaw* [1960] 2 MLJ 64 (refd)
3 *Cooper & Crane* v *Wright* [1902] AC 302 (refd)
4 *Skates* v *Jones & Co* [1910] 2 KB 903 (refd)
5 *Snell* v *Unity Finance Ltd* [1963] 3 All ER 50 (refd)
6 *Potter* v *John Welch & Sons Ltd* [1914] 3 KB 1020 (refd)
7 *Riches* v *Director of Public Prosecutions* [1973] 2 All ER 935 (folld)

Legislation referred to

Public Authorities Protection Act 1948 s 2(a)
Workmen's Compensation Act 1952 ss 12, 19(1), (2)

Appeal from: Civil Appeal No 12-19 of 1988 (High Court, Seremban)

S Kulasegaran (*Rajendra Kulasegaran* with him) for the applicant.
Mohd Akhir bin Mohd Desa for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appeal is against the decision of the High Court judge (Mustapha Hussain J) who had earlier dismissed an appeal by the appellant

against the judgment of the arbitrator confirming the award made by the Commissioner for Labour under the Workmen's Compensation Act 1952. [See [1990] 3 MLJ 114.] The total amount of compensation awarded was $7,787.33.

The appellant is a statutory authority under the Land Development Act 1956 which body was established under that Act to promote and carry out projects for land development and settlement and for purposes connected therewith. In the course of carrying out its objectives the appellant engaged a contractor to fell and clear the jungle in an area and to prepare the land for rubber planting. The respondent was employed by the contractor on 23 June 1979 as a chain-saw operator to fell trees and was paid $25 per day. On 26 July 1979 the respondent met with an accident while so employed.

The respondent instituted action for compensation on 25 May 1983, that is about three years and ten months after the accident. An enquiry was held by the Commissioner for Labour at Kuala Pilah on 10 August 1983 under s 27 of the Workmen's Compensation Act 1952 where the Commissioner computed a compensation of $7,787.33 to be paid by the appellant to the respondent.

On 13 September 1983 the case of the respondent was referred to the arbitrator in the sessions court Seremban under s 30 of the Workmen's Compensation Act 1952. The arbitrator confirmed the award on 7 May 1987.

When the appeal came to the High Court Seremban the appellant was allowed by the learned judge to make an amendment to the petition of appeal. The amendment allowed was in relation to the law of limitation to be applied against the respondent which became one of the issues in this appeal. The amendment reads as follows:

> 4 The respondent's claim was void and statute-barred pursuant to s 12(1) of the Workmen's Compensation Act 1952. Accordingly the arbitrator lacked jurisdiction to hear the respondent's claim pursuant to s 12(1) (ibid). The respondent's claim against the appellant should have been instituted within six months of the date of the accident upon which the claim is based, ie within six months of 26 July 1979, whereas the respondent instituted his claim against the appellant vide Borang G of the Act (ibid) only on 25 May 1983, ie three years and ten months later.
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> 5 Additionally and without prejudice to para 4 hereinabove, the respondent's claim is also void and statute-barred pursuant to s 2(a) of the Public Authorities Protection Act 1948, as applied to the appellant by virtue of s 65 of the Land Development Ordinance 1956, under which the respondent's claim against the appellant ought to have been instituted within 36 months of the date of the accident upon which the claim is based, ie within 36 months of 26 July 1979, whereas, in fact, the said claim was instituted vide Borang G of the Workmen's Compensation Act 1952, only on 25 May 1983, which was three years and ten months later.

After hearing the appeal the learned judge dismissed the appeal and among other things ruled that it was too late for the appellant to raise the question of limitation at that stage and secondly, the appellant was liable to pay because the appellant was a 'principal' within the meaning of s 19(1) of the Workmen's Compensation Act 1952. These two rulings became the issues in the present appeal.

It is not disputed that the question of limitation was not raised before the Commissioner nor before the arbitrator. It was raised in the appeal when the petition of appeal was amended with the leave of the learned judge.

The issue whether the appellant is the 'principal' within the meaning of s 19(1) of the Act should be determined first. It was the view of the learned judge that the appellant would be liable if the work that was being carried out by the respondent was for the purpose of or in the course of the appellant's trade or business. The learned judge recognized that the appellant is a statutory body entrusted with the duty of clearing jungles and to see that the areas so cleared are suitable for planting rubber and palm oil. The learned judge ruled that the work that was being carried out by the respondent even though the respondent was employed by a contractor, was in the course and for the purpose of the appellant's business.

We agree with the view of the learned judge on this issue. For the purpose of determining this issue the operative words in s 19 of the Workmen's Compensation Act 1952 are 'the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him'.

Subsection (2) of s 19 of the Act also provides that 'Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the person who would have been liable to pay compensation to the workman if this section had not been enacted.'

Following *Hockley* v *West London Timber and Joinery Co*[1] the test to be applied to s 19(1) of the Act should be as stated in *Soon Peng Siong* v *Sin Yuh Miaw*[2] which is a Singapore case dealing with an equivalent provision:

> In order that s 19(1) of the Workmen's Compensation Ordinance shall apply there must first be work undertaken by the principal; secondly, the work must be in the course of, or for the purpose of his trade or business; and, thirdly, he must contract with another person for the execution of the whole, or some part, of the work. Whether the work is undertaken by the principal is in each case a question of fact.

The rationale of s 19(1) is as described by Halsbury LC in *Cooper & Crane* v *Wright*[3] in the House of Lords when dealing with s 4 of the English Workmen's Compensation Act 1906 that it was 'the general design of the statute to enable an injured workman to make a claim

for damages against an employer even if he was not the immediate employer of the person injured'. At p 321 his Lordship said:

> Now, it appears to me that the general design of the statute was to enable an injured workman, or, in the event of his death, his representatives, to make a claim for damages against the employer in the sense of a person who was constructing the building, even if he was not the immediate employer of the person injured. The theory of the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall in a certain sense be insured against any accident that takes place in the course of his employment. It was probably obvious to the legislature that, if the workman was driven to sue a sub-contractor and could not rely upon the responsibility of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or, if he did, to obtain satisfaction by suing a person able to pay damages. But then the legislature seems to have provided that though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet, the theory of the statute being that the employer was to be made liable, the contractor for the whole work might procure his indemnity for the liability against the actual employer of the injured workman.

It is obvious to us therefore that the provision of s 19(1) of the Workmen's Compensation Act 1952 is intended to extend to a case of a person who for the purpose of his trade or business undertakes work on his account and employs a contractor to do the whole or part of the work. See also *Skates* v *Jones & Co.*[4]

The next issue raised in the appeal is the question whether the law of limitation should be applied although not raised until the appeal before the learned judge. In his grounds of judgment the learned judge disallowed the question as the point was raised too late although he admitted that the respondent instituted the action some three years and ten months after the accident.

We are of the view that the learned judge misdirected himself on this issue. Once he allowed the amendment to be made to the petition of appeal it became an issue which should be considered in the appeal. The point raised should then be considered on its merits and if the learned judge found as he did in this case that the claim was statute barred then the appeal should have been allowed.

The position in regard to the institution of the proceeding by the respondent is very clear. The action is time-barred under s 12(1) of the Workmen's Compensation Act 1952 ('the Act') and also s 2(a) of the Public Authorities Protection Ordinance 1948.

Section 12(1) of the Act reads:

> Except as provided in this section proceedings for the recovery of compensation for an injury under this Act shall not be maintainable unless notice of the accident in respect of which such compensation is claimed has been given to the employer within seven days after the happening thereof and unless a claim for compensation with respect to such accident has been made within six months from the happening of the accident causing the injury, or, in case of death, within six months from the date of the death.

There is a requirement of notice and there is also requirement as to period of making a claim. Therefore the claim by the respondent should have been instituted within six months of the date of the occurrence of the accident, that is, within six months from 26 July 1979.

The law of limitation raises the question of jurisdiction and jurisdiction cannot be conferred by acquiescence or waiver. Section 12(4) of the Workmen's Compensation Act 1952 provides for an exception to the requirement of s 12(1) in that the failure to make a claim within the period specified shall not be a bar to the maintenance of the proceedings if it is found by the court that the failure was occasioned by mistake, absence from Malaysia or other reasonable cause.

The onus of showing mistake, absence from Malaysia or other reasonable cause is on the claimant. There is nothing in the record of proceedings before the Commissioner or arbitrator or the learned judge of the High Court that any explanation at all was given by the respondent for the failure to comply with the provision of s 12(1) of the Act.

Here this court is not dealing with a matter of admission of new evidence. Once the statutory instrument, in this case the provision of s 12(1) of the Act, has been brought to the court's attention it is the court's duty to apply it. A somewhat similar situation arose in *Snell* v *Unity Finance Ltd.*[5] There the action was for damages arising out of the condition of a car sold under a hire-purchase agreement. Illegality of the agreement was not pleaded and not raised in the county court when judgment was given for the plaintiff. On appeal it was held:

> (i) Once the facts which made the hire-purchase agreement illegal had become apparent to the county court it was the court's duty, whether illegality was or was not raised by the parties, to refuse to enforce the hire-purchase agreement; the Court of Appeal would not allow any limitation on appeals from county courts by reason of the point of illegality not having been taken below to prevent the court's giving effect to this principle, and accordingly the appeal would be allowed and the action would be dismissed.
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> (ii) (Per Willmer LJ, Danckwerts LJ, concurring). Taking notice of the provision of the Hire-Purchase and Credit Sale Agreements (Control) Order 1960, was not a matter of admission of new evidence (cf, per Diplock LJ, at p 61, letter F, post) on appeal to prove the order, but, the statutory instrument having been brought to the court's attention, the court's duty was to apply it.

Potter v *John Welch & Sons Ltd*[6] also dealt with a claim under the English Workmen's Compensation Act 1906. In that case a workman met with an accident and he

immediately reported the matter verbally to the foreman but stated that he was not severely injured. The doctor continued to attend to the workman from time to time. Subsequently a few months later he died as a result of the original injury. No notice of the accident beyond what was verbally given was given by the workman to the employers. His widow subsequently brought an action under the Fatal Accidents Act 1846 for the benefit of herself and her children. At the trial the jury returned a verdict that the deceased had been guilty of contributory negligence and an application was therefore made to the judge to assess compensation under the Workmen's Compensation Act 1906. On appeal it was held that since no 'reasonable cause' within the meaning of s 2 of the 1906 Act had been shown for the failure of the workman to give notice of the accident to his employers the widow was not entitled to compensation under the Act. Lord Cozens-Hardy MR said at p 1030:

> In those circumstances, what was the 'reasonable cause' for the failure to give notice of the accident? I daresay the man was ignorant of the law, but that is no excuse. ... In my opinion, with the greatest possible respect to Channell J, there was no evidence in this case to justify the finding that there was 'reasonable cause' for not giving notice within the meaning which has been given to those words by this court in many cases. I think therefore the appeal must be allowed.

Reverting to the present appeal before us there is room for escape from the strict compliance of the provision of s 12(1) of the Workmen's Compensation Act 1952 and as pointed out earlier this is provided in sub-s (4) of that section. Under the provision of that subsection it is up to the claimant to satisfy the court that the delay in making the claim was due to a mistake or absence from Malaysia or other reasonable cause. But the onus was never discharged by the respondent. The issue was never raised before the Commissioner or the arbitrator and when the issue was raised before the learned judge no explanation was given as required by sub-s (4) of s 12. Therefore, as Davies LJ said in *Riches* v *Director of Public Prosecutions*:[7]

> If there is any room for an escape from the statute, well and good; it can be shown. But in absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

We accordingly allow the appeal. Since the issue of limitation was never raised until the appeal before the learned judge we make no order as to costs.

Appeal allowed.

Solicitors: *Ranjit Thomas & Kula; Mohd Akhir & Partners.*

Reported by *Prof Ahmad Ibrahim*

Co-operative Central Bank Ltd v Haji Rosli bin Haji Kamaruddin

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-146 OF 1990
MOHAMED AZMI, AJAIB SINGH AND JEMURI SERJAN SCJJ
13 FEBRUARY 1991

Unincorporated Associations — Claim against co-operative society — Allegation that services of employee had been terminated — Claim for compensation — Claim not disputed but only the quantum — Whether there was a dispute touching business of co-operative society — Co-operative Societies Act 1948, ss 2 & 49(1)

Words and Phrases — 'Dispute' — Co-operative Societies Act 1948, s 49(1)

In this case the appellant co-operative society had been placed in receivership and the receivers had terminated the services of the respondent in the co-operative society. The respondent was requested to submit his claims for compensation and he did so. As he received no replies from the appellant he brought an originating summons alleging that his services had been unlawfully terminated and claiming compensation. The appellant claimed that the dispute was a dispute touching the business of the appellant between the respondent, as an employee and officer of the appellant, and the appellant and that the respondent had not exhausted the remedies available to him under the Co-operative Societies Act 1948. The appellant applied to strike off the respondent's originating summons but this was dismissed. The appellant appealed.

Held, dismissing the appeal:
In this case the appellant did not challenge the validity of the claim for compensation by the respondent under his service agreement but challenged the quantum. It follows therefore that there is no dispute since for the purpose of s 49(1) of the Co-operative Societies Act 1948 the dispute must be a dispute relevant to the existence of the respondent's right to the relief claimed under his service agreement and not merely the quantum of the relief.

[Bahasa Malaysia summary

Di dalam kes ini perayu sebuah syarikat kerjasama telah diletakkan di bawah perintah penerima dan pegawai penerima telah menamatkan perkhidmatan responden di dalam syarikat kerjasama itu. Responden telah diminta mengemukakan tuntutannya untuk mendapat pampasan dan ia telah berbuat demikian. Oleh kerana ia tidak mendapat apa-apa jawapan dari perayu ia telah membawa saman pemula mendakwa bahawa perkhidmatannya telah ditamatkan menyalahi undang-undang dan menuntut pampasan. Perayu mendakwa bahawa pertikaian itu adalah pertikaian berhubung dengan urusan perayu, antara responden sebagai pekerja dan pegawainya dan perayu dan bahawa responden belum menghabiskan pemulihan yang boleh didapati olehnya di bawah Akta Pertubuhan Koperasi 1948. Perayu memohon saman pemula responden itu dibatalkan, akan tetapi permohonan itu telah ditolak. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:
Di dalam kes ini perayu tidak mencabar keesahan tuntutan pampasan oleh responden di bawah perjanjian perkhidmatannya akan tetapi hanya mencabar kuantumnya. Jelaslah tidak terdapat pertikaian oleh kerana untuk maksud s 49(1) Akta Pertubuhan Koperasi 1948, pertikaian itu mestilah satu pertikaian mengenai wujudnya hak responden mendapat remedi yang dituntut di bawah perjanjian perkhidmatannya dan bukan hanya kuantum pemulihan itu.]